No. 18705

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORMAN NATHAN SELLER,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

OPENING BRIEF OF APPELLANT.

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OPENING BRIEF OF APPELLANT NORMAN N. SEMLER.

Statement Disclosing Basis of Jurisdiction.

On or about November 16, 1962, a grand jury in the United States District Court for the District of Arizona returned an Indictment against Norman Nathan Semler and 12 other persons. [Tr. I, 3.][1] Though the Indictment contained ten counts, Mr. Semler was charged in only four: Counts I, V, VII and X. Count I charged all defendants with conspiracy to steal government property and to receive stolen government property in violation of *18 U. S. C. §371 and §641.*

Count I of the Indictment sets forth 36 overt acts in which Mr. Semler was named in overt acts numbers 19, 22 and 36. Count V of the Indictment charged

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[1]Tr. I, 3. Reference is to the volume and page of the Transcript of Record, which is Volume I. The Reporter's Transcript of the Evidence will be referred to as "R.Tr." followed by the page number.

Edsel Dekalb Howell and Mr. Semler with receiving, concealing, having and retaining with the intent to convert to their own use and gain, six radio-receivers, on or about the 22nd day of March, 1962, each of a value in excess of the sum of $100.00, "which said property had theretofore been stolen as they then and there well knew, all in violation of *18 U. S. C. §641.*"

Count VII of the Indictment charged Howell and Mr. Semler with receiving 20 radio-receivers on or about March 27, 1962, and Count X charged Howell and Mr. Semler with receiving 8 radio receivers-transmitters on or about May 26, 1962.

On November 16, 1962, Mr. Semler entered a plea of not guilty as to each of Counts I, V, VII and X, with leave granted to him to file such motions or pleadings addressed to the Indictment as may be advised. [Tr. I, 4.] A motion in behalf of Mr. Semler to dismiss the Indictment, supported by a memorandum brief [Tr. I, 4, 5] was filed. A motion to strike with a memorandum in support thereof [Tr. I, 6], a motion for bill of particulars with a memorandum in support thereof [Tr. I, 7], a motion for change of venue and an affidavit and memorandum in support thereof, and a motion for severance and for separate trial together with a memorandum in support thereof [Tr. I, 9] were also filed. All of these motions were denied. [Tr. I, 10.]

A motion for postponement of the trial date together with a memorandum in support thereof [Tr. I, 11] was also filed, which motion was denied. The motions in behalf of Mr. Semler for a change of venue and for defendant's motion for continuance of trial were renewed on January 14, 1963 and were denied. [Tr. I, 13.]

The trial commenced on January 14, 1963, and continued from day to day to February 9, 1963, when the jury returned a verdict of guilty as to defendant Semler on Counts I, V, VII and X. [Tr. I, 14.]

From his conviction by the jury on the Indictment charging him with conspiracy in Count I and substantive Counts V, VII and X and from the Judgment thereon, Norman N. Semler respectfully appeals.

Notice of appeal on behalf of Mr. Semler was filed on February 25, 1963 [Tr. I, 20] and an amended notice of appeal was filed on March 5, 1963. [Tr. I, 21.]

The District Court had jurisdiction of the trial as does this Court of this appeal.

Statement of the Case.

Norman N. Semler, head of Semler Industries, Inc., has been in the business of purchasing war surplus materials since he came out of the service.[2] The business is operated from an office, showroom and warehouse on Lankershim Boulevard, North Hollywood, Califnia, with five employees. [R. Tr. 2035.] The company buys and sells surplus materials from bases around the country. [R. Tr. 2039.]

Mr. Semler first met Edsel Howell in 1955 through the head of security at Davis-Monthan Air Force Base in Tucson. [R. Tr. 2040.] At that time Mr. Semler and three other surplus dealers formed a joint venture

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[2]For seven years he was Assistant Purchasing Agent of an aircraft company. He started the war surplus business in 1955. First he was connected with Associated Surplus Company and later started the present organization known as Semler Industries, Inc. He helped organize Aircraft Electronic Dealers' Association and is President of that organization at this time. He is on the Board of Directors of the National Surplus Dealers' Association. [R. Tr. 2034 and 2035.]

called Strategic Air Parts Company, because they had purchased material which was coming out of a salvage operation of planes, and was sold by the Air Force to Page Airways Company. They, in turn, re-sold the salvage out of the airplanes to Strategic Air Parts Company. [R. Tr. 2040.]

Howell was employed as a foreman for Strategic Air Parts Company, to oversee the removal of the instruments from the airplanes purchased by Page. At that time Howell was a sergeant in the Air Force attached to Davis-Monthan Air Force Base, but it was permissible for service men to accept private employment in their off hours. He worked for Strategic Air Parts Company for about two months. [R. Tr. 2044.]

Howell Goes Into Surplus Business.

In 1956, Strategic Air Parts Company had litigation with Page Airways Company and Howell was a witness. At that time, in the corrider of the court room he stated to Mr. J. J. Candee, one of the joint venturers, and to Mr. Semler, that he (Howell) was going to get into the surplus business in his spare time and would buy and sell surplus material. Semler and Candee said to Howell to be sure to call either of them if he had anything which would be of interest to them. [R. Tr. 2046.] Later Semler had correspondence with Howell. [Exs. "B" through "G".] [R. Tr. 2047.] Mr. Semler did business with Howell in 1957 and 1958, purchasing surplus aircraft material from him and paying for the materials by checks. These exhibits are important, showing a regular course of business dealings between Mr. Semler's company

and Howell beginning in 1955. [R. Tr. 2052-2081.] The exhibits include transactions and purchases from Howell and are covered by ledger sheets, purchase orders and checks in payment therefor. [See Semler's Exhibits listed in appendix.]

When surplus aircraft material is purchased from salvage it is shipped to Semler Industries, Inc., in North Hollywood, California, then it is sent to a company to be cleaned, the metal polished, the parts sprayed, relettered and stencilled, and then sent to Lockheed Aircraft Corporation in Burbank which does the electronic check-out of the instruments. It is then certified and ready to be shipped by Semler Industries, Inc. to the purchasing customer. [R. Tr. 2087 and 2088.]

Edsel Howell, the technical sergeant stationed at Davis-Monthan Air Force Base, 15th Fighter Squadron, at Tucson, Arizona, admitted that he was involved in thefts at Davis-Monthan Air Force Base in 1961 and thereafter. [R. Tr. 1251-1252.]

Sgt. Woolridge approached Howell and said he had some radio equipment he was going to turn into the salvage yard of the 15th Fighter Squadron. Woolridge wanted to know if Howell could sell it. Howell replied, "I don't know right at present. I know a couple of guys I can call in that business." [R. Tr. 1254.] Howell testified he called Mr. J. J. Candee in Burbank first but he did not talk to him because he was not in his place of business at the time. Then he called Mr. Semler at North Hollywood, California, found him in, and stated that a friend of his had some old radio sets that he wanted to get rid of and did Mr. Semler want to purchase them. He was asked what they were and stated he did not know. Mr. Semler then told

him to find out first and call him back. [R. Tr. 1255-1256.]

Later Howell contacted Sgt. Woolridge to inquire about the units. Woolridge wrote it down on a piece of paper and gave it to Howell. Howell stated that he would call the man back. Howell called Mr. Semler, described the radio units, discussed the price, and Mr. Semler stated he would take them. Howell did not tell Mr. Semler where the radios came from. Howell asked Mr. Semler to come to Tucson and get them, but he does not remember whether Mr. Semler came to Tucson or whether he shipped the radios to him. [R. Tr. 1257.] Howell stated that he shipped some "stuff" to Semler two or three times after that. Howell admitted he was paid for the shipments but does not recall the amount. [R. Tr. 1258.]

The next occasion when Howell called Mr. Semler was in June 1961, concerning the sale of 10 ARN-14's radios. Sgt. Woolridge delivered these to Howell, who called Mr. Semler. The sets were delivered to Howell in the desert about 4 or 5 blocks from Howell's home. Then Howell called Mr. Semler and made the sale to Semler Industries, Inc. [R. Tr. 1259 through 1264.]

In July 1961, Howell stated Sgt. Woolridge again approached him and said that he had more equipment to sell. These were 7 sextants. After Howell inspected the sextants with Sgt. Woolridge and Sgt. Milne, and some ARN-21's radios, Howell called Mr. Semler and offered them for sale. Mr. Semler purchased the sextants and the ARN-21's and asked Howell to ship them to Semler Industries, Inc. [R. Tr. 1265, 1266-1267, 1268, 1269.] Later Howell called Mr. Semler and told him he had more radios for sale. Mr. Semler came

to Tucson, met Howell who made the delivery of the radios to him and the material was shipped to Semler Industries, Inc. in North Hollywood, California. [R. Tr. 1271 and 1272.]

Dixie Howell Introduces a "Conspiratorial Tone."

Howell testified that he called Mr. Semler to come to Tucson if he was interested in purchasing some radios in July, 1961. [R. Tr. 1271.] Mr. Semler came to Tucson and bought the radios. [R. Tr. 1272.] Howell stated that Mr. Semler told him at this meeting that when he (Howell) called on the telephone to describe radio sets as "suitcases" and sextants as "eyeglasses" [R. Tr. 1273]. Evidently this testimony was volunteered by Howell to introduce a conspiratorial tone to the sales transactions.

Letters sent by Mr. Semler to Howell in their dealings indicate that Mr. Semler always referred to radio-receivers as receivers and not as "suitcases." [Semler Exs. A, L, N-1, N-3, O, Q-1, Q-2, R-1, R-2, S, T, U, V, W, X, Y, AC, AD, and AE.] [Index of Exhibits indicates pages of R. Tr.] These indicate that the purchases of material were made by Semler Industries Inc. with supporting purchase orders, invoices, and checks. Nowhere in these Exhibits is there any reference to "suitcases" or "eyeglasses."

In his testimony, Mr. Semler denied [R. Tr. 2095 and 2096] that the word "eye" was used in discussions between Howell and him. The direct testimony of

Mr. Semler concerning this is stated in Reporter's Transcript 2095-2098.[3]

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[3]"Q. Did you ever receive any calls from Mr. Howell on that private line? A. No, sir.

Q. Did you ever give Mr. Howell the telephone number of that private line? A. No, I did not.

Q. What about the slang expression 'eye' for periscope? Did you ever use that, or was that ever used in any discussion between you and Mr. Howell? A. No, it was not.

Q. What about the word 'suitcase'? A. Yes, it was used.

Q. All right. Can you tell us the context, how it was used and by whom? A. Yes. Sometime in our dealings I had purchased some sextants from Mr. Howell that were not cased. And at another time—in other words, they were loose—and at another time I had purchased some that were in fiberglass—looking like suitcases, and also some that were in mahogany or some kind of hardwood, wooden case.

At another time when he offered them to me, I said, 'Do they have the little plastic suitcase-type of carrying case with them?' And this would make me determine the price of what they would be worth to me.

Q. Did he ever, in discussions with you, refer to ARN-14's, 21's or ARC-33's, or ARC-34's as suitcases of any particular length?

Mr. Lindberg: If the Court please, object to the leading nature of the question, if he's referring to a conversation, to the lack of foundation.

The Court: No, the question was did he ever. He may answer. A. No.

Q. (By Mr. Hughes) By 'he,' I refer to Dixie Howell. A. I realize that. No.

Q. With respect to the shipment of items purchased from Mr. Howell, did you ever ship from Tucson to any place other than Semler Industries? A. No, sir.

Q. Did you ever ship to any—items in any name other than the name of Semler Industries? A. No, sir.

Q. That the person, the place to which the shipment was directed, have you always used the name Semler Industries? A. Yes, sir.

Q. Did you always use your business address? A. Yes.

Q. So far as the documents that were prepared at the time of shipping, did you—what name did you use? A. You mean when I signed it or when I addressed it?

Q. Both, so far as the sender was concerned? A. Well, the sender was Semler Industries and then the little place where you sign it, I—If I were the shipper I would sign it there.

Q. Did you always sign your own name? A. Yes.

Q. Did you ever sign any name other than your own? A. No.

Howell testified that he received from $16,000 to $20,000 from Semler Industries, Inc. for the sale of salvage materials. [R. Tr. 1304.] Howell retained one-third for himself and gave Woolridge two-thirds of the money for distribution to the persons involved in the thefts of the salvage materials sold to Semler Industries, Inc. by Howell. [R. Tr. 1269.]

The Charges Against Appellant.

Count I charges Mr. Semler with conspiracy to receive Government property together with 20 other persons, most of them connected with the Davis-Monthan Air Force Base at Tucson, Arizona and at Phoenix, Arizona. Some were named as co-conspirators but not as defendants. (Indictment pages 1 through 8.) Included in Count I are 36 alleged overt acts setting forth the activities of the alleged co-conspirators. Mr. Semler is named in 3 alleged overt acts.[4] Mr. Semler

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Q. What about Mr. Howell, did he use any different names when he was contacting you? A. Other than Howell?

Q. Yes. A. No, other than his first name, or oh, sometimes after I got the call through he's say, 'Hello, Sem, this is Dixiebelle.'

Q. Did he ever use the name, 'Jackson'? A. No, sir.

Q. And all the calls that you received from Mr. Howell came through the number that is answered by your secretarial staff? A. By the girls, yes."

[4]19. That on or about the 22nd day of March, 1962, defendant Norman Nathan Semler drove to the Sands Motor Hotel parking area, Tucson, Arizona, and parked the car he was driving next to the said truck of defendant Edsel Dekalb Howell.

22. That on or about the 29th day of March, 1962, Clint Roger Woolridge and defendant Edsel Dekalb Howell drove to the Tucson Municipal Airport at Tucson, Arizona, in the truck of defendant Edsel Dekalb Howell and met defendant Norman Nathan Semler.

36. That on or about the 25th day of June, 1962, defendant Norman Nathan Semler felw to Tucson, Arizona and rented a car.

was indicted on Counts V, VII and X (all substantive counts), for theft of Government property and knowingly receiving stolen Government property.[5]

It will be noted that Counts V, VII and X charge Howell and Mr. Semler with receiving, concealing, retaining with intent to convert to their own use and gain a total of 34 radio receiver-transmitters, "all of which said property had theretofore been stolen as they then and there well knew, all in violation of 18 U. S. C. §641." Howell pleaded guilty to these and other Counts and received a one year's sentence after he testified in behalf of the Government. His testimony does not indicate (1) that Mr. Semler knew that the merchandise was stolen, and (2) that Mr. Semler received and retained the merchandise for his own use knowing it was stolen, or converted for his own use and gain. Howell's testimony clearly indicates that he sold the merchandise to Semler Industries, Inc. and was paid for it. [R. Tr. 1267, 1272, 1282, 1286, 1287, 1288, 1301, 1303 and 1304.]

Trial Judge Halts Cross-Examination of Howell.

In the cross-examination of witness Howell, the Court did not permit questions to be asked concerning sales of stolen Air Force property by Howell to persons other than appellant Semler. [R. Tr. 1386.] On direct examination [R. Tr. 1300, lines 2-8], the Government was permitted to question witness Howell about this, but on cross-examination the Court did not permit the cross-examination to develop sales of stolen Air Force property by Howell to other persons.

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[5]See Indictment [Tr. I, pp. 9, 10, 11].

Defense Counsel representing defendant Semler, asked witness Howell [R. Tr. 1386, line 21] if Howell sold stolen United States Government property to any one other than Mr. Semler. The Court, on page 1387, line 17, cautioned the witness that he has the right to refuse to answer on the grounds that the answer might incriminate him.[6]

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[6]The cross-examination concerning this point begins on page 1386, line 3 (following the Q. by Mr. Chandler):

"Q. Did you generally sell, during this period of time, to other people other than Mr. Semler?

Miss Diamos: Objection, your Honor. Immaterial.

The Court: No. He may answer that question. We won't go into the details of it. He may answer this question.

The Witness: Do I have to answer that question, sir?

The Court: Yes, sir. Just yes or no.

A. Would you repeat the question, sir?

Q. (By Mr. Chandler): During the period of time that we are now discussing, I'm talking about 19—well, late '60, '61—no, I'm talking about '61; May of '61 until May of '62, did you generally sell property to people other than Semler? A. Could I refuse to answer that, sir?

The Court: Pardon me. Property generally, Mr. Chandler?

Mr. Chandler: No, not property generally.

Q. (By Mr. Chandler): I want to limit the question, Mr. Howell, to property that you either took from the United States or that you know—that you knew was taken from the United States, radio, electronic or other equipment relating to aircraft. Did you, during that period of time, make sales to other persons, other than Mr. Semler?

Mr. Muecke: It's immaterial, your Honor. Furthermore, it calls for a conclusion on his part. We were not permitted to have witnesses testify as to whether the property was or was not the property of the United States.

He is asking the same question. Asking the witness to tell whether or not he knew it was property of the United States and we are going beyond the scope of the direct again, and it's immaterial.

The Court: No. The objection will be overruled.

Mr. Chandler: Do you remember the question, Mr. Howell?

The Court: Just a moment, Mr. Chandler.

Read me the question, Mr. Reporter.

Trial Judge Gives Conspiracy Instruction at Beginning of Trial.

At the beginning of the trial when the second witness (Chappell) was called to the stand and his direct examination progressed for a while, the Court gave a conspiracy instruction to the jury endeavoring to distinguish between evidence that will be offered under the conspiracy count (Count I) and evidence that may be

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'Whereupon, the pending question was read by the Reporter'

The Court: In the light of that question, Mr. Chandler, it's my duty to instruct the witness as to his rights with regard to that particular question.

Sergeant Howell, you have a right when a question similar to this is asked you, transactions other than you have heretofore pleaded guilty on, you have a right to assert your constitutional rights to refuse to answer the question on the grounds that it may incriminate you, and that right is not only to refuse to answer the question on the grounds that it may incriminate you, but any question that might lead, if you answered it, to a line of inquiry and other questions and other answers that might incriminate you.

If you desire to exercise that right, you must exercise it at the outset of the questioning. In other words, whenever the subject is taken up as to which you feel ultimately answers may incriminate you.

Those are your rights and you are entitled to rely on them. As a matter of fact, looking up, I just see Mr. Tinney in the courtroom, and you are entitled to the advice and counsel of Mr. Tinney at this time.

Would you come up, Mr. Tinney.

Mr. Tinney: Yes, sir.

The Court: You can either consult with your client here or you may do it—you may withdraw for consultation if you desire.

Mr. Tinney: I would prefer to have an instance of counseling with my client out of the courtroom, your Honor.

The Court: Very well. Are you prepared to go to another subject, Mr. Chandler, and let the witness have the advice of his counsel before pursuting this?

Mr. Chandler: Yes, I will try to stay away from anything that might raise the problem, and if he'd stand behind me and just tug me if I do.

The Court: Very well."

offered as to the substantive counts (Counts II and IV through X.)[7] This unusual instruction to the

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[7]R. Tr. 133, line 16, through 137, line 22:

"The Court: Members of the Jury, at this time I am going to give you an instruction or instruct you as to your consideration of an application of evidence that may be introduced in the case, and there will be a difference between the evidence that is offered under the conspiracy count or count 1 and evidence that may be offered as to the substantive counts, that is count 2—there is no count 3—and counts 4 through 10.

I will begin by telling you that when several defendants are on trial ordinarily there is admissible against each defendant evidence of only his own acts and evidence of an act done by a co-defendant or another person may not be considered by the jury as against the defendant not doing the act. In such a case ordinarily, also, a statement is made outside court by one defendant or by another person, may not be considered as evidence against a defendant not present when the statement was made. This, as I say, is the rule ordinarily applicable to evidence introduced in this case with respect to count 2 or count 4 through 10, the substantive counts. With respect to any of those counts, evidence of an act done or a statement made outside of court by one defendant or another person may not be considered by you as evidence against another defendant not present when the act was done or the statement was made. When, however, two or more persons associate themselves together in a conspiracy, that is, a combination or agreement to violate the law, there arises from the very act of associating themselves together for such a purpose a kind of partnership in which each party to the combination or agreement is the agent of every other party to the plan. Consequently, in a case where the evidence shows beyond a reasonable doubt a conspiracy or a common plan or arrangement to violate the law, entered into between two or more persons, evidence as to an act done or a statement made by one is admissible as against all, provided the act be done knowingly and the statement be made knowingly during the continuance of the conspiracy and in furtherance of an object or a purpose of the conspiracy. With regard only to count 1 of the indictment in this case, the count which charges all of the defendants with conspiracy, I instruct you that if you find from the evidence beyond a reasonable doubt that the defendants or some of them entered into a conspiracy as charged in count 1, to steal, take and carry away, and to receive and conceal, have and retain, with intent to convert to their own use and gain, certain property of the United States Air Force, the evidence as to any act done or

jury at the beginning of the trial is contrary to Rule 30, F. R. Cr. P., which provides:

"* * * the court shall instruct the jury *after* the arguments are completed." (Emphasis added.)

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statement made by one of the defendants who was a party to the conspiracy is admissible against all who were parties to the conspiracy, provided the act was knowingly done or the statement was knowingly made, during the continuance of the conspiracy. In order to establish proof that a conspiracy existed, as charged in count 1, the evidence must show beyond a reasonable doubt that the parties to the combination or plan or agreement in some way or manner, or through some contrivance positively or tacitly came to a mutual understanding to try and accomplish their common object or purpose. In order to establish proof that a particular defendant was a party to or a member of a conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy was formed and that the defendant knowingly participated in the conspiracy with the intent to advance or further some object or purpose of the conspiracy. In determining whether or not a particular defendant was a party to or a member to a conspiracy, the jury is not to consider what others may have said or done. That is to say, the membership of a defendant in a plan or arrangement or agreement must be established by evidence of his own conduct, what he himself said or did. Thus, with regard to count 1, if and when, but only if and when, it appears from the evidence beyond a reasonable doubt that a conspiracy did exist and that a defendant was one of the parties thereto, then the acts thereafter knowingly made by a defendant likewise found to be a party to the conspiracy, may be considered by the jury as evidence in the case as to the defendant found to have been a party, even though the acts or statements may have occurred in the absence of and without the knowledge of such defendant, provided such acts or statements were knowingly done or made during the continuance of the conspiracy and in order to further an object or a purpose of the conspiracy.

With regard to counts 2 and 4 through 10, evidence admitted of any act done by one person will not be considered by you as evidence against any other person, unless the latter was present and heard the statement made.

That is the rule of evidence that is applicable in the matter. Of course the issue of whether or not there was a conspiracy cannot be settled with one sentence, one witness or anything else, but you will have to bear in mind what must be established, as I have explained it to you,

No Knowledge That Material Was Stolen.

There is no question that a number of air force employees conspired with Sgt. Clinton R. Woolridge over a period of years to break into storage sheds and airplanes to steal salvage material at Davis-Monthan Air Force Base in Tucson, Arizona. [R. Tr. 1447.] There is also no dispute that Woolridge then sought out Sgt. Howell to sell the stolen goods. [R. Tr. 1447.] Woolridge, in his direct examination by the U. S. Attorney [beginning R. Tr. 1443], stated that he had been in the Air Force for 12 to 13 years and that he knew Sgt. Howell. He admitted that he talked to Howell during 1961 about the sale of some radios and he procured other air force personnel in the Supply Department to help him steal the salvage items in the salvage yard. [R. Tr. 1447.] He also admitted that he "sold the stuff that we obtained to Dixie Howell" [R. Tr. 1450.] He also described how he, Dixie Howell and John Milne did the stealing in the fall of 1961, when they crawled under the fence and removed 6 items from aircraft. [R. Tr. 1252.]

Mr. Semler did not know about the thefts by Woolridge and his group of airmen [R. Tr. 221][8] and the

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before you will be permitted to consider the act or statement, or statement of one defendant or another person outside of the presence of that other person. You will have to apply it in accordance with the rules I have just given."

[8]Under cross-examination by Mr. Muecke [R. Tr. 2219 through 2223] Mr. Semler described how he purchased salvage airplane material from Howell.

Reporter's Transcript, page 2219, line 23:

"Q. During the period then that Dixie was a foreman for Strategic this was the operation that went on, Page would buy the plane, remove it from the storage area to the smelter area and then they would notify you about a particular plane—by you, I mean Strategic Air Parts,

agreement to sell the receivers to Dixie Howell. [R. Tr. 1450.] Mr. Semler was called in by Howell to buy the equipment, but Howell did not disclose to Mr. Semler that the equipment was stolen. The testimony

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and in turn you would send Dixie and his crew to taking the equipment off, is that correct? A. That is correct, yes, sir.

Q. During that period Dixie sold no equipment to Strategic that you know of? A. No, it would have been our equipment.

Q. He was on a straight salary with you? A. Yes.

Q. Following the period when Dixie was not working for Strategic and you said that he went into the junk business, or he said that he went into the junk business on his own, do you recall what his operation was at that time? A. No, I do not.

Q. Why do you say that? A. I don't recall.

Mr. Hughes: I object to that. That is argumentative, the manner in which the question was put.

Q. (By Mr. Muecke) I will make it more specific, Your Honor.

How did you enter into the arrangement with Mr. Howell to get equipment for you—I presume that is what we are talking about, is that correct? After he quit working for Strategic, he began to deliver equipment to you personally? A. He sold me equipment, yes, sir.

Q. And he did? A. Yes, sir.

Q. Do you know where he got the equipment from? A. No, I do not.

Q. In other words, you didn't inquire into that? A. No, I did not.

Q. Because it is a practice of your business not to inquire into sources? A. Yes, sir.

Q. So that you would simply tell him what you wanted? A. No, the other way. He would offer me various items and I would buy it if I thought it was a good buy, something I could use.

Q. And do you recall any conversation where he told you where those items came from? A. I do not.

Q. You don't recall? A. I do not recall.

Q. There is something, was something in your testimony about competitors that were on the area here who were also salvaging. Can you tell us the names of some of those competitors during this period? A. The principal competitor in this area that I had reference to was J. J. Candee.

Q. And you stated, I believe, he got—was it sextants, $50 for 50, is that correct? A. No.

of Woolridge indicates that he sold the equipment to Howell who in turn sold it to Semler Industries, Inc. [R. Tr. 1445-1446.]

Prejudicial Newspaper Publicity.

From the Indictment in July, 1962, and continuing through the end of the trial in February, 1963, the thefts from Davis-Monthan Air Base in Tucson, Ari-

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Q. What was it you said he got cheaper? A. He bought—I bought from him, rather, amplifiers and gyros at $50, which I had been previously, the best price I could buy them was at $75.

Q. This was in 1957? A. No, sir.

Q. When was this? A. This would have been, I believe, in 1961 or '62.

Q. Well, going back to 1957, were there other competitors during that time, people getting salvage in the Tucson area from the Military? A. There were a lot of people getting, yes. Aero Sales was here, Thompson Aircraft was, I believe, taking delivery of planes at that time. I am not sure. There were many people doing this.

Q. During this time then did you get your salvage or surplus from Dixie Howell in 1957? A. I did buy some, yes, sir.

Q. You say that you never indicated to him what you wanted, but he would tell you what he had, is that correct? A. No. Generally he would offer me certain items, but as has been a practice of mine, if I believe an item is available in a certain area or certain place, or knowing they are wrecking planes, or knowing they are dismantling boats, whatever the item may be, I would contact somebody in that area and ask them: 'I am looking for such and such.'

Q. How do you find out certain parts are available in a certain area? A. Well, this is one of the things you learn after being in the business 16 or 17 years. I generally know that aircraft by the hundreds, if not thousands, have been wrecked and dismantled in Arizona.

I likewise know that certain other types of equipment would be available in the Texas area.

Q. I don't mean to interrupt you, but let's say in the Arizona area, how would you know that certain types of equipment are available in Tucson, let's say? A. I am on the National Bidders list, my company is, and I generally receive most of the bids.

Q. Do you get a catalog which covers what is offered for sale? A. I get a good portion of them, yes."

zona were played up in the newspapers. Mr. Semler was unfavorably described as "Mr. Big," "The leader of the conspiracy," "Top Suspect Nabbed in Calif.," "Has To Be A Little Crooked," "Convicted Sergeant Testifies," "Coast Man Linked To D-M Thefts," "Involved In 'Dry Run'—3 D-M Theft Case On Probation," "Semler Owes Me $17,000, says Former D-M Airman," "Semler Haggled On Price, Says Former D-M Airman," "Wealthy Californian's Name Enters Case—United States Witness Says Semler Had Radios," "Semler, D-M Cohorts Found Guilty," and "Semler Sentenced To 2½ Years—Air Force Thefts."

This constituted a serious impairment to Mr. Semler and prevented him from obtaining a fair trial by an impartial jury as guaranteed to him by the sixth amendment of the Constitution. This will be covered in the argument under the heading "Prejudicial Newspaper Publicity." A number of the articles appearing in the newspapers are set forth in the Appendix under the title "Newspaper Articles."

Mass Trial of Defendants.

Mr. Semler was obliged to stand trial with 7 other defendants out of 21 who were indicted. It was not made clear to the jury that of the remaining 14 who were indicted and not put on trial, that their cases were disposed of on pleas and the Indictments were dismissed as to others. Among the 13 not tried was Sgt. Woolridge who organized the thefts. Sgt. Dixie Howell was tried with Mr. Semler, but he was a Government witness and received an extremely light sentence of one year in jail for buying all the stolen material. This deprived Mr. Semler of a fair trial and will be discussed further in the Argument.

The Jury Read the Newspapers.

The jury panel consisted of 28 jurors. [R. Tr. 3.] Between the defendants and the Government 14 challenges were used, which left a panel of 12 jurors and 2 alternates. The Judge consumed 8 pages describing to the members of the panel the "general idea of the nature of the case. . . ." [R. Tr. 4-12.]

On a show of hands 26 out of 28 jurors indicated that they subscribed to the *Arizona Daily Star* or to the *Citizen,* newspapers printed in Tucson. All of them raised their hands indicating that they read the Sunday edition of the *Arizona Daily Star*. [R. Tr. 34.] Juror Abbott stated she had a son-in-law on the police force in the City of Tucson. [R. Tr. 36.] Juror Pellon stated he had a brother-in-law on the Tucson police force. [R. Tr. 38.] Juror Michall stated her son is in the air force, in the military police and security [R. Tr. 39], and Juror Watwood stated that he read newspaper accounts about the case two or three days before the case went to trial.

It is interesting to note the dialogue between the trial judge and juror Watwood [R. Tr. 20, 21]:

> "The Court: Any other jurors who read anything about the—Mr. Watwood?
>
> Mr. Watwood: I read the newspaper account rather sketchily, that's all.
>
> The Court: When was this, Mr. Watwood?
>
> Mr. Watwood: Recently. I don't remember, Friday or Saturday.
>
> The Court: Some days back? Well, can you now recall, Mr. Watwood—and I don't want the details, but can you just answer this yes or no—

can you now recall the details of the article that you read?

Mr. Watwood: No, only in a general way.

The Court: I see, well, whatever it was that you read, did it cause you to form or to express any opinion as to the guilt or innocence of any of the defendants in the case?

Mr. Watwood: No.

The Court: If you were chosen and selected to try the case as a juror, would you be able and would you keep completely out of your mind whatever it was you may have read and base your verdict in the case solely on the evidence in the case and the Court's instructions as to the law?

Mr. Watwood: That's right.

The Court: And you would do that?

Mr. Watwood: Yes.

The Court: Thank you, sir."

From the foregoing it is apparent that juror Watwood was anxious to get on the jury to try this case and either consciously or subconsciously had a reason to serve, which may be construed as prejudicial to appellant Semler in view of the wide newspaper publicity given this case.

Specifications of Errors Relied Upon.

1. The evidence is insufficient to sustain a conviction as to Count I of the Indictment stated upon an alleged conspiracy in which it is claimed Mr. Semler participated.

2. The evidence is insufficient to sustain a conviction as to Counts V, VII and X of the Indictment.

3. The Court erred in excluding cross-examination of witness Howell, who was an accomplice, concerning sales of property stolen from Davis-Monthan Air Force Base to persons other than the defendant, Mr. Semler.

4. The Court erred in failing to provide Appellant a fair trial and an impartial jury.

5. The Court erred in failing to grant Appellant Semler's motions to dismiss the Indictment, the motion to strike, the motion for change of venue, the motion for severance and for separate trial, the motion for a new trial and for denying Appellant's motion for judgment of acquittal.

ARGUMENT.

I.

The Evidence Is Insufficient to Sustain a Conviction on the Conspiracy Count.

Lack of complicity in the criminal conspiracy by Appellant Semler requires reversal of judgment. The testimony clearly shows that Sgt. Woolridge and Sgt. Dixie Howell set up the thefts of the salvage radios from the airplanes and that Mr. Semler was not aware that this was stolen merchandise. [R. Tr. 2221.] Woolridge completed the thefts with his gang and sold the material to Dixie Howell. [R. Tr. 1450.] He in turn sold the material to Semler Industries Inc. of North Hollywood, California. [R. Tr. 1257, 1258-1259 through 1264.] Therefore, there was no complicity on the part of Appellant Semler in the criminal conspiracy of these men.

In *Scales v. United States,* 367 U. S. 203 at 225 (1961), footnote 17, the Court defined "complicity" as follows:

> "A person is an accomplice of another person in commission of a crime if:
>
> "(a) with the purpose of promoting or facilitating the commission of a crime, he
>
> "(1) commanded, requested, encouraged or provoked such other person to commit it; or
>
> "(2) aided, agreed to aid or attempted to aid such other person in planning or committing it. . . .
>
> "(b) acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission. . . ."

The case goes on to state at page 227:

> "What must be met, then, is the argument that membership, even when accompanied by the elements of knowledge and specific intent, affords an insufficient quantum of participation in the organization's alleged criminal activity, that is, an insufficiently significant form of aid and encouragement to permit the imposition of criminal sanctions on that basis."

Appellant Semler was called on the telephone by Howell to buy the material after it was stolen. Therefore, it cannot be claimed that he participated in the act of agreement to steal the material. [R. Tr. 1257, 1258.]

It will perhaps be claimed by the Government that because Mr. Semler's company purchased the material from Howell, that this made it possible to carry out the unlawful object of the conspiracy, but in *Direct Sales Co. v. United States,* 319 U. S. 703, 709 (1943) the Supreme Court said that:

> "One does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, *unless he knows of the conspiracy* . . ." (Emphasis added.)

It has also been stated that to aid and abet a crime it is not necessary merely to help the criminal, but to help him in the commission of the particular criminal offense. A person does not aid and abet a conspiracy by helping the conspiracy to commit a substantive of-

fense, for the crime of conspiracy is separate from the offense which is its object.

Pereira v. United States, 347 U. S. 1, 11 (1954);
People v. Tavormina, 257 N. Y. 84, 177 N. E. 317 (1931).

There was no criminal intent in this case on the part of Appellant Semler. In every sense of the term he was an innocent purchaser for value.

II.

The Evidence Is Insufficient to Sustain a Conviction as to Counts V, VII and X of the Indictment.

The prosecution failed to establish that Appellant Semler was guilty under Counts V, VII and X because it did not prove that when he purchased the material from Howell that he did so "knowing it to have been embezzled, stolen, purloined or converted" as provided in 18 U. S. C. A. §641.

The conspiracy statute (18 U. S. C. A. §371, 1952) contains no provision for liability for substantive crimes, and 18 U. S. C. A. §641 provides for knowledge on the part of one who acquires property of the United States that the property was embezzled, stolen or purloined.

In *United States v. Peoni,* 100 F. 2d 401 (2d Cir. 1938) (L. Hand, *J.*) the Court held that a defendant, in addition to having knowledge of the probable result, must have "a stake in the outcome" of a crime in order to be convicted as an accomplice. In *Peoni,* the defendant having sold counterfeit bills to X, who in turn sold some to Y, was convicted as an accomplice to Y's crime of passing counterfeit money. This conviction

was reversed on the ground that there was no proof the defendant had an interest in furthering Y's activities.

III.

The Court Erred in Excluding Cross-Examination of Witness Howell Concerning Sales of Stolen Government Property to Other Persons.

The trial court did not permit counsel for Appellant Semler to proceed with the cross-examination of witness Howell concerning sales of the stolen material to persons other than Appellant Semler. This was highly prejudicial to Appellant Semler. A full review of the trial court's action is set forth in footnote 5 to the Statement of The Case appearing on page 10 of this brief.

In *Rogers v. United States,* 340 U. S. 367 (1951), the court sustained a conviction of contempt. In testifying before the Grand Jury defendant admitted that she had been Treasurer of the Communist Party for Denver. However, she refused to tell to whom she had turned over certain records. In sustaining the conviction, the Supreme Court noted at page 371:

> "To uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony."
>
> * * * * *
>
> "But petitioner's conviction stands on an entirely different footing, for she had freely described her membership, activities and office in the Party. Since the privilege against self-incrimination presupposes a real danger of legal detriment arising

from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her. Disclosure of a fact waives the privilege as to details. As this Court stated in *Brown v. Walker,* 161 U. S. 591, 597 (1896):

> 'Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.'

"Following this rule, federal courts have uniformly held that, where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details. The decisions of this Court in *Arndstein v. McCarthy,* 254 U. S. 71 (1920), and *McCarthy v. Arndstein,* 262 U. S. 355 (1923), further support the conviction in this case for, in sustaining the privilege on each appeal, the Court stressed the absence of any previous 'admission of guilt or *incriminating facts,*' and relied particularly upon *Brown v. Walker, supra,* and *Foster v. People,* 18 Mich. 266 (1869). The holding of the Michigan court is entirely apposite here:

> 'Where a witness has voluntarily answered as to materially criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate'. 18 Mich. at 276."

In *Brown v. United States,* 356 U. S. 148 (1958) the court sustained a conviction for contempt due to petitioner's failure to answer questions on cross-examination in a denaturalization suit. The Court therein noting at pages 154 and 155:

> "Our problem is illuminated by the situation of a defendant in a criminal case. If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. 'He has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' *Fitzpatrick v. United States,* 178 U.S. 304, 315; and see *Reagan v. United States,* 157 U.S. 301, 304-305. The reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf. It is reasoning that controls the result in the case before us."

The basic reasoning which compels conclusion that the witness Howell should not have been able to claim the privilege against self incrimination with respect to sales to persons other than appellant Semler when being subject to cross-examination was stated by Judge Learned Hand in *United States v. St. Pierre,* 132 F. 2d 837 (2d Cir. 1942) cert. dismissed 319 U. S. 41 where he noted at page 839:

> "The law in this country has developed without such irrational refinements; it rests upon the obvious injustice of allowing a witness, who need

not have spoken at all, to decide how far he will disclose what he has chosen to tell in part, and how far he will refuse to let his veracity be tested by cross questioning. In adversary cases it is hard to see how a trial could go on, if this were allowed. Certainly the party who has called the witness should not profit by what he says, and it is small relief for the judge to admonish the jury to disregard what they have heard. The witness has no just claim for such tenderness, unless he has not learned of his privilege before he consents to speak, and not then if the law charges him with knowledge of it anyway. It must be conceded that the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition. The time for a witness to protect himself is when the decision is first presented to him; he needs nothing more, and anything more puts a mischievous instrument at his disposal."

IV.

The Court Erred in Failing to Provide Appellant Semler With a Fair Trial and an Impartial Jury.

A. Prejudicial Joinder of Appellant Semler With Other Defendants.

Rule 14 of the Federal Criminal Rules is entitled "Relief From Prejudicial Joinder." The rule provides that if a party is prejudiced by a joinder of offenses

or defendants, the Judge may or may not do something about it. The literal language of the rule permits a judge to find as a fact that a defendant is prejudiced by a joint indictment but still allows a mass trial on the theory that instructions will magically cure the prejudice.

Judge Learned Hand commented on this rule with tongue-in-cheek and illustrated how rough this brand of justice is on defendants in *Nash v. U. S.,* 54 F. 2d 1006 (2d Cir. 1932) when he declared at page 1007:

> "In effect, however, the rule probably furthers, rather than impedes the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's."

Whenever a crime involves more than one actor, the courts must balance the need for trial procedures capable of dealing efficiently with joint defendants against the need for protecting the rights of the individual defendant. (*Krulewitch v. U. S.,* 336 U. S. 440, 445 (1949).)

When the prosecution presents a mass of evidence as to a complex conspiracy involving a large number of defendants, it is likely that the jury will infer an association among the defendants merely from the fact that they are being tried together. (*United States v. Standard Oil Co.,* 23 F. Supp. 937 (WD Wis. 1938).)

B. Prejudicial Newspaper Publicity.

The constitutional rights of an accused are first jeopardized when the crime is reported in the newspapers. Communal hostility is naturally directed at the accused, especially after he is indicted. When he is unfavorably described as "Mr. Big", "the leader of the conspiracy," and statements are issued by the U. S. Attorney and the F. B. I. before the trial, an atmosphere is created against the accused which makes a fair trial by an impartial jury impossible as guaranteed by the Sixth Amendment of the Constitution. He is tried and convicted before the trial starts.

Our judicial system seeks "the ascertainment of the truth according to the rules of evidence."[9] Certain evidence is excluded because of its tendency to "confuse, mislead or prejudice juries."[10] Mere suspicion, choice of possibility or probability, surmise, speculation, conjecture and insinuations are not regarded as evidence in a judicial proceeding. A U. S. Attorney is not permitted to introduce any evidence which does not conform to the rules of evidence. However, when the press releases a vast amount of publicity daily, the jurors are faced with information unchecked by the selective processes of the law. The people who supply the printed information are "unsworn, unconfronted, uncross-examined and uncontradicted."[11]

In *State v. Taborsky,* 20 Conn. Supp. 242, 131 A. 2d 337 (1957), aff'd. 147 Conn. 194, 158 A. 2d 239 (1960), a highly publicized murder case, the defendant's motion for a change of venue was denied.

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[9]Conrad, *"Modern Trial Evidence,"* Preface V (1956).
[10]Conrad, *"Modern Trial Evidence,"* at page 26.
[11]Conrad, *"Modern Trial Evidence,"* at page 19.

The court, admitting that there had been "unusual publicity" connected with the case stated that there was no evidence before the court indicating prejudicial results from such publicity.

The Judge refused to apply the Supreme Court case of *Shepard v. Florida,* 341 U. S. 50 (1951) stating, "no such (Southern) prejudice could possibly exist in Hartford County." The Court further stated in that case:

> "Undoubtedly such publicity had an impact on general public opinion and probably created indelible marks * * * But despite the efficient publicity, it is doubtful that there are many people in the county who would be unwilling to accord the defendant a fair trial."

The Court treated the problem as if the community could be impartial at its will despite effects of the "indelible unconscious marks" which were created by the press. A deluge of prejudicial information was printed in the *Taborsky* case that would never be admitted as evidence in a court room.

As a result of the mass publicity given to our case in Tucson, Arizona,[12] it would have been extremely difficult to locate anyone who had not read about it in the newspapers. In the article in the "Arizona Daily Star" dated July 3, 1962, Edward Boyle, an F. B. I. Agent, in charge of Arizona, gave an interview stating that the investigation is continuing and other arrests may occur; that F. B. I. Agents are searching for other hidden radio sets and are investigating how the sets were disposed of; that the radios

[12]See Newspaper Articles in appendix.

were a "hot item" and much in demand for both military and civilian aircraft; that the sets were probably disposed of through both local and interstate outlets; that he would not comment on the question of whether they were smuggled out of the country for use by planes of a foreign country.

The article further states that investigators "hinted" that the thefts may have occurred over a two to three year period and that the overall value of the missing equipment may reach an estimated $300,000 to $400,000. In the story there is this quote:

> "They've been stealing them blind out there (storage yard) for years."

and attributed this to "a source."

On November 8, 1962, "The Arizona Daily Star", circulated in Tucson, Arizona, ran a 5-column heading in its new section blazening these headlines:

> "TOP SUSPECT NABBED IN CALIF. GRAND JURY INDICTS 13—D-M THEFT PROBE"

The story went on to state:

> "In North Hollywood, Calif., FBI Agents arrested Norman Nathan Semler, described as the 'Mr. Big' of the theft ring."

Nothing in the story would indicate that Mr. Semler was attempting to flee or to avoid arrest to justify the headline, "Top Suspect Nabbed in Calif." The article continues with statements attributing to Mr. Muecke, United States Attorney, the following:

> "After processing the equipment in the plant the stolen items were sold to other parties, Muecke said. Semler did business with Spain, Formosa

> and West Germany *but Muecke said he had no knowledge that he ever sold any of the equipment —some of it the latest classified type—to any iron curtain country. 'But that's not saying some of it didn't eventually end up in Red hands,' Muecke said.*" (Emphasis added.)

As a result of this damaging newspaper publicity, a motion was filed in behalf of appellant Semler for a change of venue which was denied. While the courts have held that extensive newspaper comment does not establish inability to receive a fair trial,[13] nevertheless in our case there is a strong inference that bias existed in the minds of the jurors as a result of the intensive campaign by the press, in publishing prejudicial material and the motion for change of venue should have been granted.[14]

The Supreme Court in *Crawford v. United States,* 212 U. S. 183 at 196 (1909), has declared that:

> "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one * * * who was quite positive that he had no bias, and said he was perfectly able to decide the question wholly uninfluenced by anything but the evidence."

In *United States v. Accardo,* 298 F. 2d 133 (7th Cir. 1962) the Court stated that each case based upon the issue of adverse publicity must rest on its special facts. The Court, in reversing the conviction, asserted that the published material would have been inadmis-

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[13]*State v. Taborsky,* 20 Conn. Supp. 242, 131 A. 2d 337 at p. 339.

[14]*People v. Sandgren,* 75 N. Y. S. 2d 753 (1947).

sible in evidence because of its tendency to prejudice the defendant. Thus, any published material which is prejudicial and which is likely to reach the jury through news accounts should be proper grounds for reversing a conviction.

A persistent practice of "insuring" a defendant of a fair trial has been to instruct the jury that they should disregard the prejudicial newspaper accounts.[15] This is not fair since it does not insulate the trial jury from hostile sentiment. Judge Frank of the Court of Appeals, Second Circuit, remarked that such an instruction "is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant."[16]

A Pennsylvania District Court, in *United States v. Ogden,* 105 Fed. 371 (1900), declared at page 373:

> "It is greatly to be deplored that a practice of which we see too many examples should exist, and that persons accused of crime should be put on trial in the columns of the newspapers, and should be declared to be guilty and denounced as criminals before there has been a careful and impartial trial in the proper and lawful tribunal."

The Court of Appeals, Sixth Circuit, in *Briggs v. United States,* 221 F. 2d 636 at p. 638 (6th Cir. 1955), stated that one of the

> "fundamental rules of criminal law is that a defendant in a criminal case is entitled to be tried by jurors who should determine the facts submitted

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[15]*Marshall v. United States,* 360 U. S. 310 (1959).

[16]*Leviton v. United States,* 193 F. 2d 848, at 865 (2d Cir. 1951), cert. den. 343 U. S. 946 (1952).

to them wholly on the evidence offered in open court, unbiased and uninfluenced by anything they may have seen or heard outside of the actual trial of the case."

There is little doubt that the power exists in a Federal Court for reversing a conviction returned by a jury corrupted by newspaper accounts relating to the trial. In *Marshall v. United States,* 360 U. S. 310 (1959), the Supreme Court took it upon itself to reverse two lower courts that had refused such relief. The court observed at pages 312-313, in granting a new trial:

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt vs. U.S.*, 218 U.S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered in evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through the news accounts as when it is a part of the prosecutor's evidence. * * * it may indeed be greater for it is then not tempered by protective procedures.

"In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the Federal courts * * * we think a new trial should be granted."

Indeed, the Court has gone so far as to grant the writ of habeas corpus where a State convicted a de-

fendant in an atmosphere created by the newspapers that made it impossible for him to secure a fair trial. *Irvin v. Dowd,* 366 U. S. 717, 730 (1961).

There are other recent cases in which judgments of convictions have been upset by reason of improper interference with the processes of the trial by public news media: *United States v. Accardo,* 298 F. 2d 133, (C. A. 7th 1962); *Coppedge v. United States,* 272 F. 2d 504 (C. A. D.C. 1959); *Holmes v. United States,* 284 F. 2d 716, 718 (C. A. 4th 1960). Certiorari was denied in *New York v. Bloeth,* 313 F. 2d 364 (digested in 49 A.B.A.J. 373; April, 1963, *sub nom. U. S. ex rel. Bloeth v. Denno*), leaving in effect the decision of the United States Court of Appeals for the Second Circuit that a New York state prisoner was denied a fair trial in a state court because excessive newspaper publicity tainted his jury.

So important is this point that there is now pending before the Congress a proposed statute to make meaningful the standards applied by the Supreme Court in the *Marshall, Accardo* and *Coppedge* cases, *supra,* by requiring the defendant to show only that the jury had access to evidence that would have been excluded from the trial because of its prejudicial nature. The burden would then shift to the prosecution to show that it had no adverse effect on the conduct of the trial. Senate Bill 1802, 88th Cong., 1st Session, June 26, 1963, entitled "To Protect the Integrity of the Court and Jury Functions in Criminal Cases."

We think this is only fair. Not only is the burden on the Government to prove the guilt of the defendant, but, when challenged, the burden should be on the Government to show that the defendant received a fair

trial by an impartial jury as provided by the sixth amendment of the Constitution. For, if the trial is not fair, as we contend in behalf of appellant Semler, there is automatic interference with the question of sustaining the burden of establishing guilt, so far as the Government is concerned.

Thus, we claim that appellant Semler did not receive a fair trial from an impartial jury. They were all residents of the Tucson, Arizona area and were exposed to the newspaper articles which practically convicted Mr. Semler before the trial started and continued throughout the trial until the jury convicted him.

C. Unconstitutional Mass Trial of Appellant Semler Requires Reversal of Judgment.

Appellant Semler was put to trial with 7 other defendants out of 21 who were indicted, which deprived him of a fair trial.

The Supreme Court in *Kotteakos v. United States,* 328 U. S. 750 (1946), reversed a conviction, partially upon the ground that a vast amount of legally irrelevant evidence had been admitted, tending to indicate some 8 different conspiracies, where the Indictment had charged a single confederation. The Court, speaking through Mr. Justice Rutledge, said:

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. * * * [the defendants have] * * * the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others * * *."

The testimony indicated various groups or teams participated in the thefts at different times, all under the leadership of Sgt. Woolridge and with the knowledge of Sgt. Howell. Appellant Semler had to sit through 17 days of the trial when this testimony was brought out through witnesses to the jury. Yet the three substantive counts (Counts V, VII and X) against appellant Semler involved only three sales out of all the merchandise stolen by Woolridge and Howell and their cohorts. Even as to the three sales there was no direct testimony that appellant Semler had any knowledge of the thefts of the merchandise.

D. Instructions to Jury Were Complicated and Confusing.

If the procedure used for the selection of jurors in this case was prejudicial to appellant Semler, the procedure in instructing the jurors at the beginning of the trial and again at the end of the trial, was highly prejudicial on two counts: (1) the apparent inability of jurors to understand and absorb oral instructions in a complicated criminal case and (2) the inability of counsel to argue effectively without knowing in advance of the exact language the Court will use in charging the jury.

It is not difficult to understand that a jury of laymen would have difficulty in listening to a 2-hour oral charge and retain it. It is difficult enough for lawyers skilled and experienced in Federal criminal law to listen to an oral charge with enough intelligence to make the proper objections afterward. To expect a juror to do the same thing and then apply the law to the facts is beyond the realm of reason and results in a prejudicial proceeding against the appellant.

V.

The Court Erred in Failing to Grant Appellant Semler's Motions to Dismiss the Indictment, the Motion to Strike, the Motion for Change of Venue, the Motion for Severance and for Separate Trial, the Motion for a New Trial and for Denying Appellant's Motion for Judgment of Acquittal.

The foregoing have been covered in the preceding Assignments of Error and Argument.

Conclusion.

A sound argument in support of Appellant's position is contained in the whole record if approached and reviewed with a calm objective. It is a large record to review, yet the issues are grave involving, as they do, a severe loss of liberty. Perhaps it is with this sense of urgency that the arguments made herein have been presented at such great length.

Appellant respectfully urges that the Court reverse the conviction and remand the case to the Court below to be disposed of in a manner to meet the standards of fairness and justice required to give Appellant Semler a fair trial before an impartial jury.

Respectfully submitted,

DAVID M. RICHMAN,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID M. RICHMAN,
Attorney for Appellant.

APPENDIX.

United States Statutes 18 U. S. C. A.

§371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

§641. *Public money, property or records.*

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725.

United States Constitution.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Index of Exhibits.

Code of abbreviations: "Id." marked for identification.
"Evid." admitted into evidence.

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THE ARIZONA DAILY STAR

November 8, 1962

Top Suspect Nabbed in Calif.

GRAND JURY INDICTS 13
IN D-M THEFT PROBE

6 Arrested In Tucson;

2 Found In Pima Jail

Bulletin: An armed suspect in the Davis-Monthan AFB theft rings has been arrested in Brooklyn, the FBI announced last night in Phoenix. Agents nabbed James E. Walston at his home. He was armed with a .30 caliber rifle but offered no resistance. Walston is being held in the Federal House of Detention in New York City, the FBI said.

By Bob Thomas

Thirteen men were charged yesterday in a secret grand jury indictment with thefts of radio communication equipment from Davis-Monthan AFB as the FBI expanded its investigation to other states.

Agents from Tucson and Phoenix arrested six of the suspects in Tucson yesterday. Two more were located in Pima County Jail, where they were being held on unrelated state charges.

In North Hollywood, Calif., FBI agents arrested Norman Nathan Semler, described as the "Mr. Big" of the theft ring.

Semler, 43, is president of Semler Industries Inc., which sells electronic and photographic equipment on an international scale, and reportedly has a gross of $1 million a year.

Edward Boyle, in charge of the Arizona FBI office, said that since the case broke last July, agents have arrested 19 men. Two men, named in the grand jury indictment yesterday, remained at large last night.

Investigators have connected the 21 men with the theft of $269,000 worth of radio and navigational equipment from D-M and Luke AFB, near Phoenix, Boyle said.

U. S. Atty. Carl A. Muecke said last night he believes that the 13 persons indicted yesterday should account for the entire theft ring.

However, he said questioning of the suspects could lead to other arrests.

Muecke, who spearheaded the investigation, alleged that Semler, a resident of swank Sherman Oaks, Calif., flew to Tucson to pick up stolen government equipment.

After processing the equipment in his plant, the stolen items were sold to other parties, Muecke said. Semler did business with Spain, Formosa and West Germany but Muecke said he had no knowledge that he ever sold any of the equipment—some of it the latest, classified types—to any Iron Curtain country.

"But that's not saying some of it didn't eventually end up in Red hands," Muecke said.

* * * * *

Bond was set for $25,000 for Semler when he appeared before a U. S. Commissioner in Los Angeles.

The 13 men are charged in an 11-page indictment with 10 counts of theft of government property, receiving stolen government property and conspiring to receive stolen government property.

McKal, who read the indictment in full to the suspects, said it was one of the longest indictments he had seem.

In it, a story of intrigue was told.

Sextants, radio receiver-transmitter sets and radio receivers allegedly were stolen from planes parked in the 2704th Aircraft Storage and Disposition Group area by the suspects, who climbed under and over the fence at night.

Some of the suspects, who worked in the storage yard, allegedly would leave the equipment to be stolen in a convenient place.

Once 10 radios were retrieved from under cactus plants just outside the D-M fence, where they had been hidden earlier.

A trailer was rented by one of the suspects to store the stolen radios until they could be disposed of, the indictment charged.

The suspects allegedly were paid $200 to $400 for each delivery. The FBI said Semler purportedly paid $65,000 for the stolen equipment he received.

ARIZONA CITIZEN
January 15, 1963

'Systematic Looting'

'ELABORATE CODE' USED IN D-M THEFTS, SAYS PROSECUTOR

By Eric Cavaliero

The government prosecutor told a U. S. District Court jury yesterday that seven defendants used an elaborate code system in the "systematic looting" of Davis-Monthan Air Force Base.

The trial of California businessman Norman N. Semler and six others charged with involvement in the theft from D-M of government property valued at $200,000 opened yesterday before Judge James A. Walsh.

In his opening statement, U. S. Atty. Carl A. Muecke said the seven-woman, five-man jury would hear during the course of the trial how defendants worked out a system of using apparently innocent words to describe such items as radios and sextants in an effort to mask their activities.

"When one of the conspirators wanted to say, "I want a certain thing," he would use some such term as " 'suitcase,' " Muecke explained. "This would tell his co-conspirator the exact number of packages required and the exact size.

"You will hear how the co-conspirators put them into the desert, put lables on them and how they were received at the other end by Semler," Muecke added.

"You will have testimony on how three radios with serial numbers went all the way through the Air Force and into Semler's hands," he said. "You will hear

how a lady—God bless her—kept meticulous records of the work she did for Semler.

"You will hear stories of meetings in motels, payoffs in men's rooms and the transfer of goods in parking lots," Muecke added.

Muecke said there were occasions when the defendants were nearly caught after "slipping over and under fences." He said a big plane was featured in one incident.

The U. S. attorney said the fact that a man was charged with conspiracy did not necessarily mean that he knew every facet of the crime.

Earlier, in addressing the jury, Judge James A. Walsh hinted that the trial may continue for two weeks or more.

* * * * *

THE ARIZONA DAILY STAR
January 16, 1963

"Has To Be A Little Crooked"

FORMER D-M SERGEANT TESTIFIES IN THEFTS

Court Told How Equipment Was Stolen, Put On Sale

By Bob Thomas

A former Davis-Monthan AFB supply sergeant, sentenced to a year in prison two months ago for his part in the theft of government radios from D-M, testified yesterday that a man "has to be a little crooked" in order to work in Air Force supply.

The witness, former S/Sgt. John J. Milne, 29, of the 15th Fighter Sqdn. at D-M, testified yesterday for the government in the trial of seven men accused of theft and conspiracy in the D-M thefts.

Milne, dressed in civilian clothes and appearing poised and alert, told the court how he and others took radios and sextants from the D-M storage yard and sold them for cash.

The witness testified most of the day in U. S. District Court yesterday and his testimony was attacked vigorously in cross-examination by defense attorneys.

It was in cross-examination by defense Atty. J. Edward Morgan that Milne made the comment about being "a little crooked".

Morgan asked Milne if in his job as supply sergeant he had ever obtained an item from supply without the necessary paperwork.

"Quite possible," Milne cracked, "In order to be in supply you have to be a little crooked in the first place."

Milne testified he had heard in 1961 through casual conversation with S/Sgt. Louis R. Giavelli, 30, also of the 15th Fighter, that money could be made by selling Air Force radios.

Giavelli had in his possession a radio directional receiver from an Air Force plane. Milne agreed to go with Giavelli and see how the set was sold.

They loaded the set in Milne's car and drove to a nearby tavern. There they were met by another D-M sergeant, Edsel (Dixie) Howell. The men loaded the set in Howell's white Cadillac convertible. Later, Milne said, Giavelli gave him $75 for his part in the transaction.

After this introduction Milne learned from his boss, Sgt. Clint R. Wooldridge, that Howell would buy both sextants and radios.

Milne, who often visited the 2804th Storage Yard at D-M on routine business, then went to the storage area and contacted a civilian foreman, Robert Clark, 36, of 8011 E. 17th St.

Clark, Milne said, agreed to supply the wanted items in exchange for a car radio.

A number of radios and sextants were then "delivered" to Milne by Clark.

* * * * *

They had collected about "10 or 12" radios and placed them outside the fence surrounding the 2704th area when they suddenly found OSI agents (Office of Special Investigations at D-M) approaching.

The three men dashed off and escaped in the darkness. Later the next day, Milne said he returned to the area and saw the radios still beside the fence, but he didn't try to retrieve them because he feared an OSI trap.

Later that fall of 1961 Milne, Woolridge and Howell again teamed up and successfully disposed of some more radios, he said.

Howell, Milne said, supplied him with a written "order" list of desired equipment. Milne gave the list to Clark and the foreman later delivered a radio set to Milne. For this Clark received $200, Milne said.

Giavelli, Woolridge and Dawkins pleaded guilty to theft charges last year and were sentenced. Giavelli and Wooldridge each received a year in prison. Dawkins was placed on probation.

Last week Howell changed his plea to guilty and he will be sentenced after the trial.

Milne stuck to his story through the strong cross-examination later.

Also testifying yesterday was Jack Kelley, of 3326 E. 24th St., and Kenneth C. Thomas, of 1313 E. Prince Rd.

Kelley, foreman of 780th Equipment Section of the 2704th, identified records for four B47 planes which an inventory showed were missing a total of eight sextants.

Thomas told of his duties as former sales officer with the 2704th.

Charles W. Chappell, chief of supplies for the 2704th, testified for an hour in the morning.

THE ARIZONA DAILY STAR
January 17, 1963

Convicted Sergeant Testifies

WITNESS LINKS OFFICER TO D-M RADIO THEFTS

Easy Money Blamed for Crime Sprees

By Bob Thomas

First Lt. Jack R. Kirvis, a supply officer for the 15th Fighter Sqdn. at Davis-Monthan AFB, was linked through testimony with three separate thefts of government radios yesterday in U.S. District Court.

Kirvis, 29, is one of seven men on trial for stealing equipment from Davis-Monthan.

For the second straight day, a 15th Fighter Sqdn. staff sergeant told a story of how a desire for easy money caused some members of the 15th to commit brazen nighttime thefts from Air Force planes.

Staff Sgt. Louis R. Giavelli, 30, said he, Lt. Kirvis, and Staff Sgt. Clint R. Woolridge, 31, climbed the chain-link fence of the "fly-away" area just 800 yards from Main Gate (manned by Air Police guards) and stole radios from three parked F86 jet fighters and a storehouse.

Giavelli, who pleaded guilty to theft of government property last August and received a sentence of one year, was a government witness. He is presently on parole from a federal prison.

Dressed in civilian clothes, Giavelli laconically related a tale of intrigue among members of the 15th Fighter supply.

Last year, over coffee in a base cafeteria, the three airmen planned a night foray into the fly-away area, a large open section of runway where planes scheduled to leave the base are parked.

In April, 1962, they climbed over the high fence and broke into three parked F86 jets, stripping them of their radio sets.

Then, Giavelli testified, Woolridge broke some glass in a nearby building and opened a door. All three men entered the building and removed two radio sets.

Woolridge again broke into another building close by and the men took three more sets.

They hauled the eight radios to the fence and lifted them over one by one and then loaded them into Woolridge's car. For his part Giavelli said he received $400 from Woolridge.

There was some confusion on how much certain types of radio sets cost. Earlier one witness testified the "acquisition cost" of 14 radios was $51,170.

Kirvis was involved in two other thefts during March, 1962, Giavelli said.

During the first half of the month Giavelli said he and Lt. Kirvis climbed over a fence in the 2704th storage area on the base and took six radio sets from parked B47 jet bombers.

They handed these radios over the fence to where Sgt. Woolridge was waiting and then helped him to load the sets in his car. Woolridge later paid him $125 to $150, Giavelli said.

Two weeks later the three servicemen returned to the same area and removed 20 radios from parked

planes. Eight of these were put into Woolridge's car, Giavelli said.

He testified he did not know what happened to the remaining 12 radios. Woolridge paid him between $200 and $300 for his part in these thefts, Giavelli said.

According to Giavelli, it was Sgt. (now retired) Edsel (Dixie) Howell, 43, who first persuaded him in 1961 to steal aircraft radios and exchange them for cash.

Giavelli said he stole a radio directional receiver that Howell wanted and asked Sgt. John J. Milne, 29, also of the 15th Fighter Sqdn., to help transport the radio set to Howell.

Using Milne's car they drove to a tavern near the base and transferred the radio to Howell's white Cadillac convertible. Giavelli said he received $150 from Howell for the radio and that he split this with Milne, giving him $75.

THE ARIZONA DAILY STAR
January 18, 1963

COAST MAN LINKED TO D-M THEFTS

Repair Firm's Records Given

By Eric Cavaliero

"You will hear how a lady—God Bless her—kept meticulous records of the work she did for Norman Nathan Semler."

U.S. Atty. Carl A. Muecke used these words Monday in his opening statement to a U.S. District Court jury trying California businessman Semler and six other men charged with involvement in the $200,000 Davis-Monthan Air Force Base thefts.

Yesterday the woman, Mrs. Lucille Andre, operator with her husband of Air Electronic Co., of North Hollywood, Calif., became the first witness to link Semler with the theft ring.

Mrs. Andre said her company did service work on radios for Semler's firm, Semler Industries Inc., of North Hollywood, which sells electronic and aerial photographic equipment around the world.

She said her records, kept at the request of the Federal Aviation Agency, showed that three radios the company repaired for Semler had identical serial numbers to equipment stolen from D-M last May.

One of the serial number she mentioned was G-12477.

Corroborative evidence came from Master Sgt. Robert Joseph Volpe, in charge of repair of radio equipment for the 15th Fighter Squadron at D-M.

Volpe said he was notified at 4 a.m. last May 26 that a repair shop on the flight line had been broken into. Two radios were missing.

There was tension in the court as Volpe added: "I remember the serial number on one of them—it was G-12477."

Volpe explained: "I remember it because I am responsible for all the equipment in that shop. If something is missing, I have to make it up."

Leon C. Lucas, a radio technician with the 2704th Storage & Disposition Group at D-M, said he was called out to the repair shop early in the morning of May 26.

"There were quite a few people milling around in the hallway," he said, "including air policemen and men from the Office of Special Investigation."

"The window on the lower left hand side, in the approximate position where the lock is, was broken," he added. "There was broken glass lying on the floor, and two radios were missing."

He said panels had been taken off planes in the nearby storage yard.

The removed panels, on the left hand side of the nose, were the main access to the two pieces of equipment, he added.

Airman 1.C. William J. McCarty, a technician repairman with the 15th Fighter Squadron, said he remembered May 26, 1962.

"It was a Friday night and I worked late in the repair shop on the flight line," he said. "I left the shop to go on an errand to the end of the runway. When I returned, it had been broken into.

"I requested a sabotage alert as there are classified papers there," he added. "But I discovered that none of them had been touched."

* * * * *

TUCSON DAILY CITIZEN

January 19, 1963

INVOLVED IN 'DRY RUN'
3 IN D-M THEFT CASE ON PROBATION

By Eric Cavaliero

Charges against three men who have admitted conspiring in the $200,000 thefts from Davis-Monthan Air Force Base were disposed of in a few minutes yesterday when all three were placed on probation for two years.

But the government indicated that the U.S. District Court trial of California businessman Norman N. Semler and six others also charged with involvement in the D-M theft ring may continue for at least another week. There still are a number of witnesses to be called before the government rests its case.

The trial's fifth day ended at 4:30 p.m. yesterday, when the jury was dismissed until Tuesday morning. Minutes later, the three other defendants were brought into the courtroom.

They were: Garnie H. Gould, 24, of 749 N. 11th Ave., Winford W. Bibbs, 25, of Kirkwood, Mo., and Richard L. Parris, 30, of 136 S. Meyer Ave.

Judge James A. Walsh said Parris' two-year probation period will begin when he completes a four-to-five year sentence he is serving currently in the state prison at Florence for burglary. The burglary conviction was not related to the D-M case.

He told Gould: "If you don't follow the conditions of your probation, the roof may fall in on you."

The judge also briefly lectured Bibbs, pointing out that probation did not mean he was getting away with anything.

Tucson attorney Arthur W. Vance Jr., who was appointed by the court to represent all three, said: "These men were involved in a single isolated incident which was in the nature of a dry run, since no equipment was taken."

The "dry run" was referred to earlier in the day by Delevin L. Williams Jr., 19, of Philadelphia, a government witness.

Williams, who was put on probation for five years last August for his part in the thefts, said he was told in May of 1961 to drive a truck to a hangar, pick up some men and equipment and take them to a barracks. However, they had no radios with them, he added, and one of the men told him they had been unable to get them.

William Hubbs Jr., of 4013½ E. Ft. Lowell Rd., who formerly worked as a store clerk in supply for the 15th Fighter Squadron at D-M, said he was paid a total of $1,000 for 11 radios. The payoff was made at the Greyhound Bus Depot here, he added, and the money "was supposed to have come from California."

Hubbs said he delivered the radios to Staff Sgt. Clint R .Woolridge, also of the 15th Fighter Squadron. He gave $250 to Alejandro M. Munoz, 29, of 4436 E. 30th St., who helped him, he added.

Hubbs also has pleaded guilty to involvement in the thefts and currently is awaiting sentence. After taking the stand yesterday he requested—and was granted—permission to take the Fifth Amendment if

asked "certain questions" which might incriminate him. He did not explain the nature of the questions, nor did he take the Fifth Amendment during his testimony.

Defendants are: Semler, Munoz, 1st Lt. Jack Raymond Kirves, of the 15th Fighter Squadron; Ernest Gaines, 21, an airman at D-M; James E. Walston, 19, a former air policeman at D-M; Curtis I. Ward, 27, of 1603 N. 5th Ave., and Robert Earl Clark, 36, of 8011 E. 17th St.

Semler, 43, of Sherman Oaks, Calif., has pleaded innocent to four counts of conspiracy and theft of government property. His firm, Semler Industries Inc., of North Hollywood, sells electronic and aerial photographic equipment.

Other headlines in the case are as follows:

SEMLER OWES ME $17,000, SAYS FORMER D-M AIRMAN

SEMLER HAGGLED ON PRICE, SAYS FORMER D-M AIRMAN

WEALTHY CALIFORNIAN'N NAME ENTERS CASE—U.S. WITNESS SAYS SEMLER HAD RADIOS

SEMLER, D-M COHORTS FOUND GUILTY

SEMLER SENTENCED TO 2½ YEARS—AIR FORCE THEFTS